



General Services Administration
Office of General Counsel
Washington, DC 20405

RECEIVED

OCT 24 1996

October 24, 1996

Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

Subject: Implementation of Section 402(b)(1)(A)
of the Telecommunications Act of 1996,
CC Docket No. 96-187.

Dear Mr. Caton:

Enclosed please find the original and eighteen copies of the General Services Administration's Reply Comments for filing in the above-referenced proceeding.

Sincerely,

Jody B. Burton
Assistant General Counsel
Personal Property Division

Enclosures

cc: International Transcription Service
Jerry McKoy (diskette)

No. of Copies rec'd 048
List ABCDE



**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

RECEIVED

OCT 24 1996

Federal Communications Commission
Office of Secretary

In the Matter of)
)
)
)
)

Implementation of Section 402(b)(1)(A))
of the Telecommunications Act of 1996)
)

CC Docket No. 96-187

**REPLY COMMENTS OF THE
GENERAL SERVICES ADMINISTRATION**

EMILY C. HEWITT
General Counsel

VINCENT L. CRIVELLA
Associate General Counsel
Personal Property Division

MICHAEL J. ETTNER
Senior Assistant General Counsel
Personal Property Division

JODY B. BURTON
Assistant General Counsel
Personal Property Division

Economic Consultant:

Snaveley King Majoros O'Connor
& Lee, Inc.
1220 L Street, N.W.
Washington, D.C. 20005

GENERAL SERVICES ADMINISTRATION
18th & F Streets, N.W., Room 4002
Washington, D.C. 20405

October 24, 1996

Table of Contents

	<u>Page</u>
Summary	i
I. Introduction	1
II. Tariffs Filed on a Streamlined Basis are Not Lawful Without Commission Determination After Investigation	3
III. Only Tariffs Containing Rate Increases or Rate Decreases Are Eligible for Streamlined Treatment	7
IV. Pre-Effective Tariff Reviews Should Not Be Eliminated	9
V. Conclusion	11

Summary

As part of its implementation of the Telecommunications Act of 1996, the Commission asked for comments on a number of its tentative conclusions relating to the streamlined tariff provisions of the statute. With the exception of comments filed by the United States Telephone Association and the incumbent LECs, GSA's positions enjoyed substantial support among the other commenting parties.

GSA and the majority of the interexchange carriers, competitive LECs and trade associations that filed comments in this proceeding did not agree with USTA and the incumbent LECs that Congress intended to modify substantially the legal status of LEC tariffs. Indeed, the lack of legislative history and the absence of corresponding modifications to other provisions of the Communications Act provide little evidence that Congress intended to make such sweeping changes to the existing regulatory treatment of LEC tariffs.

In addition, GSA and most of the non-incumbent LEC parties strongly disagreed with USTA and the incumbent LECs that retroactive damages were prohibited for successful challenges to LEC tariffs. Without an express intent to eliminate an important consumer protection, Congress could not have intended to preclude retroactive damages in these instances.

GSA's position that only LEC tariffs containing rate increases or rate decreases are eligible for streamlined treatment was echoed by several commenting parties. The only parties that advocated a contrary position were the incumbent LECs and the USTA.

GSA also enjoyed support for its concern about the Commission's reliance on post-effective review of streamlined tariffs. GSA continues to encourage the Commission to use pre-effective review for LEC tariffs as much as possible, particularly tariffs containing rate increases, as these filings pose the greatest danger for abuse and subject captive ratepayers to an unacceptable level of risk.

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of

Implementation of Section 402(b)(1)(A)
of the Telecommunications Act of 1996

CC Docket No. 96-187

**REPLY COMMENTS OF THE
GENERAL SERVICES ADMINISTRATION**

The General Services Administration ("GSA"), on behalf of the customer interests of the Federal Executive Agencies, submits these Reply Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"), FCC 96-367, released September 6, 1996. The NPRM addresses various aspects of the Commission's implementation of the streamlined tariff review provisions of the Telecommunications Act of 1996 ("1996 Act")¹ for Local Exchange Carriers ("LECs").

I. Introduction

To foster competitive and deregulated telecommunications markets², Congress included provisions in the 1996 Act that streamline the filing procedures for some LEC

¹Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

²Joint Statement of Managers ("Explanatory Statement"), S. Conf. Rep. No. 104-230, 104th Cong., 2nd Sess.

tariffs. Specifically, the 1996 Act adds to the Communications Act³ a new Section 204(a)(3), which states:

A local exchange carrier may file with the Commission a new or revised charge, classification, regulation, or practice on a streamlined basis. Any such charge, classification, regulation, or practice shall be deemed lawful and shall be effective 7 days (in the case of a reduction in rates) or 15 days (in the case of an increase in rates) after the date on which it is filed with the Commission unless the Commission takes action under paragraph (1) before the end of that 7-day or 15-day period as appropriate.⁴

GSA's comments, which were filed on October 9, 1996, explained the customer interests of the Federal government as they relate to the Commission's implementation of these provisions. A total of 28 parties also filed comments in this proceeding. These parties included:

- 10 incumbent LECs
- 2 associations representing incumbent LECs
- 3 interexchange carriers
- 5 competitive LECs
- 5 telecommunications associations
- 1 joint filing from national broadcast networks
- 1 filing from a document management company

³Communications Act of 1934, 47 U.S.C. 151 *et seq.*

⁴Section 402 (b)(1)(A)(iii) of the Act.

In these Reply Comments, GSA responds to a number of positions advanced by these parties, particularly those offered by the United States Telephone Association ("USTA") and the incumbent LECs.

II. Tariffs Filed on a Streamlined Basis Are Not Lawful Without Commission Determination After Investigation

The USTA and all ten of the incumbent LECs that filed comments in this proceeding advance the position that tariffs filed on a streamlined basis are lawful unless the Commission takes action prior to the expiration of the notice deadlines.⁵ Pacific Telesis Group ("Pac Tel") goes even further by asserting, "[t]he intended change is not merely to be one of timing, but is also to change the carriers' substantive rights to have their tariffs treated in all respects as lawful until the Commission makes a contrary finding."⁶ Further, because of this interpretation, the LECs argue that retroactive damage awards for successful challenges to LEC tariffs are prohibited. According to this view, LEC liability is limited only to prospective application of an unlawful tariff.

GSA and nearly all other commenting parties object to these positions for several reasons.⁷

⁵The notice period for rate decreases is 7-days, and for rate increases it is 15-days.

⁶Comments of PacTel, page 3.

⁷See, e.g., Comments of AT&T, pp. 4-7; Time Warner, pp. 3-6; Competitive Telecommunications Association, pp. 1-3.

First, by focusing only on the “deemed lawful” language, the USTA and incumbent LECs ignore other significant provisions of the Communications Act that Congress left in place. By choosing not to modify these provisions, Congress could only have intended that these provisions would remain in full force. Thus, while the new Section 204(a)(3) does contain the “deemed lawful” language, this provision cannot be viewed in isolation. It must be analyzed in the context of the entire Communications Act.

As GSA explained in its comments, the 1996 Act contains no modifications of other operational provisions of the Communications Act to which the new Section 204(a)(3) relates. For instance, there were no changes to the Commission’s authority to ensure that LEC rates are just, reasonable and non-discriminatory, as required by Sections 201 and 202.⁸ Nor were there modifications to the Commission’s authority to prescribe rates in Section 205⁹ or to act on complaints against LEC tariffs filed pursuant to Section 208.¹⁰

Without changes to these sections, Congress could not have intended this radical departure from the existing tariff scheme. The only reasonable interpretation of the “deemed lawful” provision is that Congress only intended it to be an adjunct to the current tariff scheme, not a replacement.

⁸47 U.S.C. Sec. 201 and 202.

⁹Id., 205.

¹⁰Id., 208.

Second, there is nothing in the provision itself or in the legislative history to suggest that Congress intended to eliminate a significant consumer protection by foreclosing the possibility of retroactive damage awards for LEC tariffs which are later determined unlawful after Commission investigation. As the Competitive Telecommunications Association notes:

Denial of damages from successful tariff challenges after a tariff had taken effect without [Commission] action would represent a major setback to consumer rights. For example, a rate increase submitted in violation of price cap requirements, if allowed to take effect by Commission inaction, could be effective for months or longer before a hearing could be concluded to find it unlawful. At the end of the hearing, the offending LEC would be ordered to revise its tariff, but would be permitted to keep its unlawful revenues. Coupled with the extremely short review periods dictated by this new [s]ubsection, consumers would have little recourse when victimized by an overpriced LEC offering.¹¹

Additionally, significant judicial precedent exists that cannot be ignored by the Commission without clear instructions from Congress. As has already been discussed, no such instructions can be found in the 1996 Act. AT&T explains this issues as follows:

In order to conclude that [Section 204(a)(3)] was intended to bar claims for damages against LECs filing tariffs pursuant to that section, the Commission would have to presume that Congress rewrote more than a century of settled law by inference, via an amendment to a subsection of the Communications Act of 1934 addressing not damages awards, but the Commission's power to suspend tariff filings.¹²

¹¹Comments of the Competitive Telecommunications Association, pp. 2 and 3.

¹²Comments of AT&T, p. 6.

Third, if retroactive damage awards were prohibited for successful challenges to LEC tariffs, Congress would have created a mechanism that encourages the very anti-competitive behavior that the 1996 Act was intended to prevent. Indeed, if LECs are able to evade a determination that their tariff filings are unlawful, they can generate unlawful revenues by forcing their competitors to pay those charges and by delaying Commission action through litigation. This circumstance would allow LECs to legally delay the implementation of competition in clear violation of the 1996 Act. As America's Carriers Telecommunications Association, an association representing small carriers, explains:

[S]mall carriers do not have the resources under today's pre-effective notice periods, much less under the streamlined 7 or 15 days now provided, to monitor and oppose the numerous LEC tariff filings that directly affect the services and prices small carriers need in order to compete against other carriers and against the LECs themselves. Far more than for end users, the inability of competitors to claim damages for unlawful LEC tariff filings will have devastating effects. Indeed, such a scheme is tantamount to a license for the LECs to put competitors, particularly small competitors, out of business. LECs could file anti-competitive tariffs, litigate the issues indefinitely and then if found in violation enjoy immunity from any responsibility for its anti-competitive behavior.¹³

Finally, even the Senate Conference Report indicates that the new Section 204(a)(3) is only procedural in nature. The Joint Statement of Managers explains, "...new subsection (b) of 402 of the conference agreement reflects regulatory relief that streamlines the procedures for revision by local exchange carriers of charges,

¹³Comments of America's Carriers Telecommunications Association, p. 7.

classifications and practices under section 204 of the Communications Act.”¹⁴

III. Only Tariffs Containing Rate Increases or Rate Decreases are Eligible For Streamlined Treatment

The USTA and all ten incumbent LECs advance the position that all LEC tariffs are eligible for streamlined treatment under the new Section 204(a)(3), including tariffs offering “new” services. They argue that, taken as a whole, the provisions indicate Congressional intent to streamline all LEC tariffs, and that the identification of notice periods for rate increases and rate decreases are simply examples of this intent. GSA and nearly all other commenting parties strongly disagree with this interpretation.¹⁵

Unlike the “deemed lawful” provision, the literal reading of the provisions indicates that only LEC tariffs containing rate increases or rate decreases are eligible for streamlined treatment on 7-day or 15-day notice. While the first sentence of the new section stipulates that LECs may file “a new or revised charge, classification, regulation, or practice on a streamlined basis,”¹⁶ there is no qualification as to the meaning of “streamlined basis.” Congress left this determination to the Commission’s discretion.

¹⁴S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 69 (1996) (emphasis added).

¹⁵See, e.g., Comments of MCI, pp. 13-16; MFS, pp. 2-6; Telecommunications Resellers Association, pp. 7-9.

¹⁶Telecommunications Act of 1996, Pub. L. No 104-104, 110 Stat. 56.

The second sentence, in contrast, does not leave to the Commission's discretion the meaning of "streamlining." Congress clearly spells it out for specific LEC tariffs. In the case of rate reductions, a 7-day notice period is required. In the case of rate increases, a 15-day notice is required. Congress identifies no other revisions or modifications to which these notice periods apply.

Further, the interpretation that LEC tariffs containing new services are eligible for the 7-day or 15-day notice periods is also contrary to the literal meaning of the provisions. Indeed, because the 7-day or 15-day notice periods apply only to tariffs containing rate increases and rate decreases, new services cannot, by definition, be construed to be an increase or decrease. Clearly, there is nothing to increase or decrease because the new service, heretofore, did not exist.

In addition, as the NPRM notes, new services have traditionally been treated differently than modifications to existing services.¹⁷ Because of the complexity of new service offerings, and the potential harm such offerings may have on consumers and competing carriers, the Commission has long held the view that such tariffs warrant a higher level of scrutiny. There is nothing in the provision itself or in the legislative history to suggest that Congress intended to eliminate this consumer protection.

¹⁷NPRM, paragraph 18.

IV. Pre-Effective Tariff Reviews Should Not Be Eliminated

The USTA and several of the incumbent LECs suggest that the Commission eliminate its use of pre-effective tariff reviews. They argue that such reviews are impractical given the abbreviated notice periods, particularly if the Commission intends to require LECs to provide additional supporting data with their tariffs. Further, some parties suggest that such reviews are completely unnecessary because they argue that tariffs filed on a streamlined basis are lawful at the time of filing. Under this interpretation, the Commission would be reviewing the effectiveness of tariffs that had already been determined, by function of the statute, to be lawful. GSA and several of the other commenting parties disagree with this position and do not believe pre-effective tariff reviews should be eliminated.¹⁸

Since Congress did not modify other operational provisions of the Communications Act, the Commission's authority and responsibilities remain the same in most respects, particularly with respect to Section 203(b)(2). In this section, the Commission is authorized, either by determination in a specific instance or by order, to defer LEC tariffs up to 120 days after filing.¹⁹ Because Congress chose not to modify this provision, the only reasonable explanation is that it intended to preserve the Commission's ability to protect

¹⁸See, e.g., Comments of MCI, pp. 18-19; MFS, p. 12; Ad Hoc Telecommunications Users Committee, p. 7; and, ABC, CBS, NBC and Turner Broadcasting, pp. 8-11.

¹⁹47 U.S.C. 203(b)(2).

ratepayers and competitors from questionable LEC tariffs, including tariffs filed on a streamlined basis.

The USTA and several others suggest this provision becomes inoperative as a result of the new Section 204(a)(3).²⁰ They argue that because Congress set up a new category of tariff procedures, the Commission's authority is prohibited for tariffs filed on a streamlined basis. However, as America's Carriers Telecommunications Association indicates, the principle of statutory construction "requires that if a reasonable interpretation of Congressional intent can be found that provides meaning to express language and avoids an interpretation that would otherwise render such language null and void, such an interpretation is to be followed."²¹ If the USTA's interpretation is reviewed in this light, Section 203(b)(2) would apply to no tariffs whatsoever, and would be rendered null and void, in contradiction to the principle of statutory construction. Therefore, the Commission retains its authority to defer LEC tariffs, whether filed on a streamlined basis or not, up to 120 days after filing.

Finally, under either interpretation of "deemed lawful," consumer protections will be diminished if pre-effective tariff reviews are eliminated. Under the interpretation that LEC tariffs are lawful at the time of filing, as the USTA and incumbent LECs contend, consumers would not be entitled to retroactive damage awards for successful challenges. Under the interpretation that challenges to LEC tariffs require a higher burden of proof,

²⁰See, e.g., Comments of USTA, pp. 2-3; GTE, pp. 7-8; BellSouth, pp. 3-4;

²¹Comments of America's Carriers Telecommunications Association, p. 3.

October 24, 1996

consumers would still be placed in a diminished position if such tariffs became effective without review. Again, it is very clear that nothing in the provision itself or in the legislative history indicates that Congress intended to limit these consumer protections.


V. Conclusion

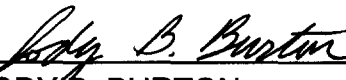
As the agency vested with the responsibility for representing the consumer interests of all Federal Executive Agencies, GSA urges the Commission to adopt the positions discussed herein.

Respectively submitted,

EMILY C. HEWITT
General Counsel

VINCENT L. CRIVELLA
Associate General Counsel
Personal Property Division


MICHAEL J. ETTNER
Senior Assistant General Counsel
Personal Property Division


JODY B. BURTON
Assistant General Counsel
Personal Property Division

GENERAL SERVICES ADMINISTRATION
18th & F Streets, N.W., Rm. 4002
Washington, D.C. 20405
(202) 501-1156

October 24, 1996

CERTIFICATE OF SERVICE

I, Jerry B. Burkett, do hereby certify that copies of the foregoing "Reply Comments of the General Services Administration" were served this 24th day of October, 1996, by hand delivery or postage paid to the following parties:

Regina M. Keeney
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 500
Washington, D.C. 20554

Jerry McKoy
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

James D. Schlichting
Chief, Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W., Room 518
Washington, D.C. 20554

International Transcription Service, Inc.
Suite 140
2100 M Street, N.W.
Washington, D.C. 20037

Paul Schwedler, Esquire
Asst. Regulatory Counsel, Telecommunications
Defense Info. Agency, Code AR
701 South Courthouse Road
Arlington, VA 22204-2199

Edith Herman
Senior Editor
Communications Daily
2115 Ward Court, N.W.
Washington, D.C. 20037

Richard B. Lee
Vice President
Snively, King, Majoros,
O'Connor & Lee, Inc.
1220 L Street, N.W., Suite 410
Washington, D.C. 20005

Joanne Salvatore Bochis
National Exchange Carrier
Association, Inc.
100 South Jefferson Road
Whippany, NJ 07981

Mary McDermott
United States Telephone Association
1401 H Street, N.W., Suite 600
Washington, D.C. 20005

Telecommunications Reports
11th Floor, West Tower
1333 H Street, N.W.
Washington, D.C. 20005

Genevieve Morelli
Competitive Telecommunications
Association
1440 Connecticut Avenue, N.W.
Suite 220
Washington, D.C. 20036

Danny E. Adams
Attorney for Competitive
Telecommunications Association
Kelley Drye & Warren LLP
1200 Nineteenth St., N.W., Suite 500
Washington, D.C. 20036

Charles H. Helein
Attorney for America's Carriers
Telecommunication Association
Helein & Associates, P.C.
8180 Greensboro Drive, Suite 700
McLean, VA 22102

Emily M. Williams
Association for Local
Telecommunications Services
1200 - 19th Street, N.W.
Washington, D.C. 20036

Alexandra Field
Attorney for Ad Hoc Telecommunications
Users Group
Levine, Blaszak, Block & Boothby
1300 Connecticut Avenue, N.W.
Washington, D.C. 20036-1703

Charles C. Hunter
Attorney for Telecommunications
Resellers Association
Hunter & Mow, P.C.
1620 I Street, N.W., Suite 701
Washington, D.C. 20006

Carolyn C. Hill
ALLTELL Telephone Services
655 15th Street, N.W., Suite 220
Washington, D.C. 20005

General Services Administration

October 24, 1996

Russell M. Blau
Attorney for McLeod
TeleManagement, Inc.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Catherine Wang
Attorney for KMC Telecom, Inc.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Michael J. Shortley, III
Attorney for Frontier Corporation
180 South Clinton Avenue
Rochester, NY 14646

Charlene Vanlier
Capital Cities/ABC, Inc.
21 Dupont Circle, 6th Floor
Washington, D.C. 20036

Diane Zipursky, Esq.
National Broadcasting Company, Inc.
11th Floor
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004

Randolph J. May
Attorney for Capital Cities/ABC, Inc.
Sutherland, Asbill & Brennan, L.L.P.
1275 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Mark W. Johnson
CBS, INC.
Suite 1200
600 New Hampshire Avenue, N.W.
Washington, D.C. 20037

Bertram Carp
Turner Broadcasting System, Inc.
Suite 956
820 First Street, N.E.
Washington, D.C. 20002

David N. Porter
MFS Communications Company, Inc.
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Andrew D. Lipman
Attorneys for MFS Communications
Company, Inc.
Swidler & Berlin, Chartered
3000 K Street, N.W., Suite 300
Washington, D.C. 20007

Michael F. Brecher
Attorney for Time Warner
Communications Holdings, Inc.
Fleischman and Walsh, L.L.P.
1400 Sixteenth Street, N.W.
Washington, D.C. 20036

Jay C. Keithley
Sprint Corporation
1850 M Street, N.W., Suite 1100
Washington, D.C. 20036

Craig T. Smith
Sprint Corporation
P.O. Box 11315
Kansas City, MO 64112

Alan Buzacott
MCI Telecommunications Corporation
1801 Pennsylvania Ave., N.W.
Washington, D.C. 20006

General Services Administration

October 24, 1996

Peter H. Jacoby
AT&T Corp.
Room 3245H1
295 North Maple Avenue
Basking Ridge, NJ 07920

Christopher J. Wilson
Attorney for Cincinnati Bell
Telephone Company
Frost & Jacobs
2500 PNC Center
201 East Fifth Street
Cincinnati, OH 45202

Thomas E. Taylor
Cincinnati Bell Telephone Company
201 East Fourth Street, 6th Floor
Cincinnati, OH 45202

Edward Shakin
Bell Atlantic Telephone Companies
1320 North Courthouse Road
Eighth Floor
Arlington, VA 22201

Robert M. Lynch
SouthWestern Bell Telephone Company
One Bell Center, Room 3520
St. Louis, MO 63101

Joseph Di Bella
The NYNEX Telephone Companies
1300 I Street, N.W. Suite 400 West
Washington, D.C. 20005

M. Robert Sutherland
BellSouth Telecommunications, Inc.
Suite 1700
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610

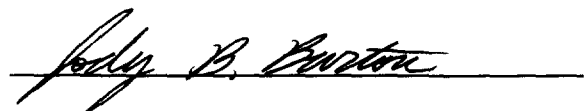
Robert B. McKenna
Attorney for U S West, Inc.
Suite 700
1020 - 19th Street, N.W.
Washington, D.C. 20036

Gary L. Phillips
Counsel for Ameritech
1401 H Street, N.W., Suite 1020
Washington, D.C. 20005

Gail L. Polivy
GTE Service Corporation
1850 M Street, N.W., Suite 1200
Washington, D.C. 20036

Michael Yourshaw
Attorney for Pacific Telesis Group
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

Jeffrey B. Thomas
Pacific Telesis Group
140 New Montgomery Street, Room 1529
San Francisco, CA 94105

A handwritten signature in cursive script, reading "Jody B. Burton", is written over a horizontal line.